Kerajaan Negeri Terengganu v SKKPJ (TM) Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS T-01(IM)-372–08 OF 2020 AND T-01(IM)-373–08 OF 2020
YAACOB MD SAM, VAZEER ALAM AND NORDIN HASSAN JJCA
12 MAY 2022

Contract — Breach — Damages — Whether plaintiff was entitled to claim for loss of profits as a result of defendant's premature termination of contract — Whether loss of profits was a natural and probable result of the breach and was within the contemplation of the parties and not remote — Whether deputy registrar had adopted the correct approach and formula in assessing the loss of profits due to the plaintiff

Pursuant to an agreement between SKKPJ (TM) Sdn Bhd ('the plaintiff') and the State Government of Terengganu ('the defendant'), the defendant granted the plaintiff a concession to extract timber and other forest products from a 16,599-hectare area (about 41,000 acres) in two forest reserves in the State in consideration for the plaintiff paying the defendant RM265m for the concession. The concession was for a period of eight years from the date the plaintiff was licensed by the State's Forestry Department ('JPNT') to extract the timber and forest products. The plaintiff made a first payment of RM5.3m to the defendant. Thereafter, the JPNT identified a 499-hectare area for the logging and extraction of timber to be carried out. That area was further subdivided into sub-blocks A, B and C. The plaintiff was only given a licence to extract timber and other forest products from sub-block A, which covered an area of 166.44 hectares (411.27 acres), for a period of one year. Seven months after the concession agreement was signed, the defendant terminated the agreement on the plaintiff's alleged failure to make the agreed second payment under the agreement. The plaintiff sued the defendant for unlawful premature termination of the agreement. The High Court found for the plaintiff and ordered damages to be assessed. The defendant did not appeal against the finding of liability. For the purposes of the assessment of damages, the plaintiff withdrew its claim for actual loss but sought loss of profits in the sum of RM977,960,039. The deputy registrar awarded the plaintiff RM12,017,108.78 holding that damages could only be awarded in respect of work done by the plaintiff in sub-block A and not in respect of the entire concession area of 41,000 acres. The High Court judge affirmed that decision. In their respective appeals herein, the plaintiff contended that the High Court's decision was wrong as the plaintiff's loss of profits was not limited to sub-block A but covered the whole concession area of 41,000 acres. The defendant, on the other hand, said that: (a) the damages that was awarded was not for actual loss

suffered by the plaintiff but was based on speculative loss of profits which should not have been allowed; (b) since the plaintiff had withdrawn its claim for actual loss, the deputy registrar should only have awarded nominal damages; (c) the amount of damages awarded to the plaintiff in respect of sub-block A was, in any case, more than what the plaintiff had pleaded, ie, the sum of RM1,343,356 in respect of sub-block A; and (d) the High Court had used a wrong and inflated loss-of-profits figure as the basis for calculating the damages due to the plaintiff.

Held, unanimously dismissing both appeals and affirming the decision of the High Court:

(1) Consequent upon the defendant's premature termination of the concession agreement, the plaintiff was undoubtedly entitled to claim for loss of profits as a natural and probable result of the defendant's breach. Such loss was within the contemplation of the parties and was not too remote in the circumstances (see paras 23–24).

(2) The plaintiff had tendered documentary evidence and called witnesses to prove its claim for loss of profits totalling RM1.198m. The defendant, on the other hand, did not produce any valuation report about the concession or adduced evidence which strongly challenged the plaintiff's calculation of loss of profits. The deputy registrar was therefore correct in relying upon the plaintiff's evidence after finding that it was supported by reliable data and other evidence. Both the registrar and the High Court judge also found the plaintiff's witnesses, SP1 and SP4 to be credible and their evidence acceptable. After considering the evidence and the applicable law, this court found that there was no reason to disagree with the concurrent findings of the High Court judge and the deputy registrar (see paras 26–37).

(3) Under the concession agreement, the parties had agreed that the plaintiff's right to extract timber and forest products from the concession area was subject to the issuance of a licence by the JPNT. Without such a licence, the plaintiff would not be able to perform its duties and obligations under the agreement and consequently would not be able to make the profits it had anticipated. Since the JPNT had only licensed the plaintiff to extract timber and forest products from sub-block A, the deputy registrar was correct to restrict the plaintiff's claim for loss of profits only to sub-block A. The method used by the deputy registrar to assess the loss of profits was also reasonable in the context of the concession agreement. There was no reason for the registrar's decision to be disturbed (see paras 44–47).

(4) Although the plaintiff contended that it had paid the defendant for three licences, this did not change the fact that only one licence was issued for the extraction of timber and timber products in sub-block A. Also, the

fact that the plaintiff had abandoned its claim for actual loss did not preclude its claim for loss of profits as this claim was pleaded in the statement of claim (see paras 48–49).

[Bahasa Malaysia summary

Menurut satu perjanjian antara SKKPJ (TM) Sdn Bhd ('plaintif') dan Kerajaan Negeri Terengganu ('defendan'), defendan memberikan plaintif konsesi untuk mengeluarkan kayu dan hasil hutan lain dari kawasan seluas 16,599 hektar (kira-kira 41,000 ekar) dalam dua hutan simpan di Negeri tersebut dengan balasan bagi plaintif untuk membayar defendan RM265 juta untuk konsesi tersebut. Konsesi tersebut adalah untuk tempoh lapan tahun dari tarikh plaintif dilesenkan oleh Jabatan Perhutanan Negeri ('JPNT') untuk mengeluarkan kayu dan hasil hutan. Plaintif membuat bayaran pertama sebanyak RM5.3 juta kepada defendan. Lanjutan itu, JPNT mengenal pasti kawasan seluas 499 hektar untuk pembalakan dan pengeluaran kayu balak yang akan dijalankan. Kawasan tersebut dipecahkan lagi kepada sub-blok A, B dan C. Plaintif hanya diberi lesen untuk mengeluarkan kayu balak dan hasil hutan lain dari sub-blok A, yang meliputi kawasan seluas 166.44 hektar (411.27 ekar), untuk satu tempoh daripada satu tahun. Tujuh bulan selepas perjanjian konsesi ditandatangani, defendan menamatkan perjanjian atas dakwaan kegagalan plaintif untuk membuat pembayaran kedua yang dipersetujui di bawah perjanjian tersebut. Plaintif menyaman defendan kerana penamatan pramatang yang menyalahi undang-undang perjanjian tersebut. Mahkamah Tinggi membuat dapatan bagi plaintif dan mengarahkan ganti rugi untuk ditaksirkan. Defendan tidak merayu terhadap dapatan liabiliti. Bagi tujuan taksiran ganti rugi, plaintif menarik balik tuntutannya untuk kerugian sebenar tetapi memohon kehilangan keuntungan dalam jumlah RM977,960,039. Timbalan pendaftar memberikan plaintif award RM12,017,108.78 dengan memutuskan bahawa ganti rugi hanya boleh diberikan berkenaan dengan kerja yang dilakukan oleh plaintif di sub-blok A dan bukan berkenaan dengan keseluruhan kawasan konsesi seluas 41,000 ekar. Hakim Mahkamah Tinggi mengesahkan keputusan tersebut. Dalam rayuan masing-masing di sini, plaintif berhujah bahawa keputusan Mahkamah Tinggi adalah salah kerana kehilangan keuntungan plaintif tidak terhad kepada sub-blok A tetapi meliputi keseluruhan kawasan konsesi seluas 41,000 ekar. Defendan pula berkata bahawa: (a) ganti rugi yang diberikan bukan untuk kerugian sebenar yang dialami oleh plaintif tetapi berdasarkan kerugian spekulatif keuntungan yang tidak sepatutnya dibenarkan; (b) memandangkan plaintif telah menarik balik tuntutan untuk kerugian sebenar, timbalan pendaftar sepatutnya hanya memberikan ganti rugi nominal; (c) amaun ganti rugi yang diberikan kepada plaintif berkenaan dengan sub-blok A adalah, dalam apa jua keadaan, lebih daripada apa yang telah diplidkan plaintif, iaitu, jumlah sebanyak RM1,343,356 bagi sub-blok A; dan (d) Mahkamah Tinggi telah menggunakan angka kerugian yang salah dan melambung tinggi sebagai asas untuk mengira ganti rugi yang perlu dibayar kepada plaintif.

Diputuskan, sebulat suara menolak kedua-dua rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Akibat penamatan pramatang perjanjian konsesi defendan, plaintif sudah pasti berhak untuk menuntut kehilangan keuntungan sebagai akibat biasa dan mungkin daripada pelanggaran defendan. Kerugian sedemikian adalah dalam kontemplasi pihak dan tidak terlalu kecil dalam keadaan tersebut (lihat perenggan 23–24).

(2) Plaintif telah mengemukakan keterangan dokumentari dan memanggil saksi untuk membuktikan tuntutannya bagi kehilangan keuntungan berjumlah RM1.198m. Defendan, sebaliknya, tidak mengemukakan apa-apa laporan penilaian tentang konsesi atau keterangan tambahan yang boleh mencabar pengiraan kehilangan keuntungan oleh plaintif. Oleh itu, timbalan pendaftar adalah betul dalam bergantung kepada keterangan plaintif selepas mendapati ia disokong oleh data yang boleh dipercayai dan keterangan lain. Kedua-dua pendaftar dan hakim Mahkamah Tinggi juga mendapati saksi plaintif, SP1 dan SP4 boleh dipercayai dan keterangan mereka boleh diterima. Selepas mempertimbangkan keterangan dan undang-undang yang terpakai, mahkamah ini mendapati tiada sebab untuk tidak bersetuju dengan dapatan serentak hakim Mahkamah Tinggi dan timbalan pendaftar (lihat perenggan 26–37).

(3) Di bawah perjanjian konsesi, pihak-pihak telah bersetuju bahawa hak plaintif untuk mengeluarkan kayu dan hasil hutan dari kawasan konsesi adalah tertakluk kepada pengeluaran lesen oleh JPNT. Tanpa lesen sedemikian, plaintif tidak akan dapat melaksanakan kewajipan dan tanggungjawabnya di bawah perjanjian dan akibatnya tidak akan dapat memperoleh keuntungan yang telah dijangkakan. Memandangkan JPNT hanya memberi lesen kepada plaintif untuk mengeluarkan kayu dan hasil hutan daripada sub-blok A, timbalan pendaftar adalah betul untuk menyekat tuntutan plaintif untuk kehilangan keuntungan hanya kepada sub-blok A. Kaedah yang digunakan oleh timbalan pendaftar untuk menilai kehilangan keuntungan juga munasabah dalam konteks perjanjian konsesi. Tiada sebab untuk keputusan pendaftar diganggu (lihat perenggan 44–47).

(4) Walaupun plaintif berhujah bahawa ia telah membayar defendan untuk tiga lesen, ini tidak mengubah fakta bahawa hanya satu lesen dikeluarkan untuk pengeluaran kayu dan produk kayu di sub-blok A. Juga, fakta bahawa plaintif telah meninggalkan tuntutannya untuk kerugian sebenar tidak menghalang tuntutannya untuk kehilangan keuntungan kerana tuntutan ini telah diplidkan dalam penyata tuntutan (lihat perenggan 48–49).]

Cases referred to

Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2015] 2 MLJ 24, CA (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569; [1994] 4 CLJ 783, SC (refd)

Mohamed Ibrahim & Anor v Christopher Piff & Anor [1981] 1 MLJ 221; [1980] 1 LNS 139, FC (refd)

Sarawak Building Supplies Sdn Bhd v The Director of Forests & Ors [2009] 9 MLJ 224, HC (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Legislation referred to

Contracts Act 1950 s 74

Appeal from: Civil Suit No 22–06 of 2003 (High Court, Kuala Terengganu)

Helmi bin Hamzah (with Muhammad Ezwar and Rusydan bin Mohd Basir) (Hisham Sobri & Kadir) in Civil Appeal T-01(IM)-372–08 of 2020 for the appellant.

Thayalan Muniandy (with Amareson K Velu) (Thayalan & Assoc) in Civil Appeal T-01(IM)-373–08 of 2020 for the appellant.

Thayalan Muniandy (with Amareson K Velu) (Thayalan & Assoc) in Civil Appeal T-01(IM)-372–08 of 2020 for the respondent.

Helmi bin Hamzah (with Muhammad Ezwar and Rusydan bin Mohd Basir) (Hisham Sobri & Kadir) in Civil Appeal T-01(IM)-373–08 of 2020 for the respondent.

Nordin Hassan JCA:

[1] There are two appeals in the present case against the decision of the High Court judge on 23 July 2020. Appeal No T-01(IM)-372–08 of 2020 is the appeal by the State Government of Terengganu and Appeal No T-01(IM)-373–08 of 2020 is the appeal by SKKPJ (TM) Sdn Bhd ('SKKPJ'). Both appeals are on the assessment of damages for breach of the timber concession agreement dated 15 January 2002.

[2] The High Court judge affirmed the deputy registrar's decision on 15 December 2019 which awarded SKKPJ damages for RM12,017,108.78.

[3] In this judgment, parties will be referred to as they were before the High

Court. We will refer SKKPJ as plaintiff and the State Government of Terengganu as defendant.

THE BACKGROUND FACTS

[4] On 15 January 2002, plaintiff and defendant entered into a timber concession agreement ('the concession agreement') where defendant is given the concession to extract timber and other forest products from an area measuring approximately 16,599 hectares (41,000 acres) in Tembat and Petuang forest reserves in the district of Hulu Terengganu, Terengganu. The consideration was that plaintiff is to pay RM265m to defendant. The concession agreement is for eight years from the date the license was issued for the extraction of timber and forest products by the State of Terengganu Forestry Department (Jabatan Perhutanan Negeri Terengganu ('JPNT')). The concession agreement was executed to facilitate the construction of the second dam in Terengganu after the Kenyir dam.

[5] In this regard, plaintiff had paid RM5.3m. as the first payment under the concession agreement.

[6] On 29 May 2002, JNPT determined a felling area of 499 hectares (1,233.03 acres) which consisted of three sub-blocks for logging activities which were as follows:

(a) *sub-block A* with an area of 166.44 hectares (411.27 acres);

(b) *sub-block B* with an area of 178.14 hectares (444.19acres); and

(c) *sub-block C* with an area of 154.42 hectares (381.58 acres).

[7] About this felling area, JNPT only issued a year logging license, timber license No L2 008/2002 (TK) for sub-block A to plaintiff.

[8] On 15 August 2002, defendant had terminated the concession agreement on the ground that plaintiff allegedly had failed to make the second payment as agreed by parties under the concession agreement.

[9] Consequently, on 3 February 2003, plaintiff commenced a civil suit against defendant at Kuala Terengganu High Court for unlawful termination of the concession agreement. After a full trial, on 2 December 2011, the High Court judge allowed plaintiff's claim and entered the judgment on liability against defendant. The judge also ordered damages to be assessed. No appeal was filed by defendant against the decision of the High Court.

[10] Before the damages were assessed by the deputy registrar, defendant withdrew the claim for actual loss but maintained the claim for loss of profits for RM977,960,039.

[11] On 15 December 2019, the deputy registrar decided that damages could only be awarded for work done in sub-block A and awarded a sum of RM12,017,108.78 with costs of RM10,000 to plaintiff. The formula used by the deputy registrar in arriving at the amount of damages is as follows:

(Projected Profit x Worked Area in Sub-Block A) / Total Area

(RM1.98 billion x 411.27 acres) / 41,000 acres = *RM12,017,108.78*

[12] Aggrieved by the decision of the deputy registrar, both plaintiff and defendant filed appeals to the High Court. On 23 July 2020, the High Court judge affirmed the decision of the deputy registrar in awarding the damages for RM12,017,108.78 to plaintiff. Hence the present appeal before us by both parties.

SUBMISSION BY PARTIES

[13] The core issues submitted by plaintiff before us from the written and oral submission can be deduced as follows:

(a) the loss of profits suffered by plaintiff extends to the entire concession area under the concession agreement which is 16,599 hectares (41,000 acres) and not limited to sub-block A area with 166.44 hectares (411 acres). This is despite only 1 license being issued by JNPT for extraction of timber product in sub-block A;

(b) plaintiff's loss of profits about the entire concession area has been proven, inter alia, by the evidence of Mohd Ami bin Omar (SP1) from AMI & Associates and his valuation report on 'Assessment on Lost Profits' (P3). The evidence was further supported by Ong Chye Lye (SP4) and Anika Megah Sdn Bhd's Forest Appraisal Report (P2);

(c) the Merchantable Timber Volume (MTV) in the concession area stated in Anika Megah's *Forest Appraisal Report* is almost similar to the MTV estimated by JNPT and cl 2.2 of the concession agreement; and

(d) the deputy registrar, inter alia, erred in assessing the damages based on the work done in sub-block A and the High Court judge fell into error in affirming the decision and further opined that there are uncertainties as to the eventual approval of licenses for the logging activities for the other two sub-blocks. It was submitted that there were no uncertainties as to the eventual approval for the licenses in the concession agreement.

[14] Counsel for defendant, on the other hand, contended as follows:

(a) the damages awarded by the deputy registrar and affirmed by the High Court judge were based on speculative loss of profits and not actual loss. It was submitted that damages for breach of contract must be based on actual loss and not speculative loss of profits as stipulated in s 74 of the Contracts Act 1950;

(b) the damages awarded for work done for sub-block A were beyond the pleaded amount which is RM1,343,356 as pleaded in para 14(iii) of the statement of claim;

(c) the deputy registrar should only award nominal damages as plaintiff had withdrawn all claims for actual damages;

(d) plaintiff has failed to prove that the damages sought are not too remote and plaintiff has taken steps to mitigate the losses as required under s 74 of the Contracts Act 1950;

(e) the deputy registrar's decision in using RM1.198 billion as the basis to calculate damages and affirmed by the High Court judge was wrong as against the pleaded case which states that the maximum value of the timber and non-timber resources was only RM977,960,039; and

(f) alternatively, it was submitted that damages must be confined to sub-block A only with the amount of RM1,343,356 as pleaded in para 14(iii) of the statement of claim.

THE CORE ISSUES

[15] The core issues in the present appeal on assessment of damages are as follows:

(a) whether plaintiff is entitled to claim loss of profits as the result of the breach of the concession agreement by defendant or must only be confined to actual loss incurred by plaintiff; and

(b) if plaintiff is entitled to claim loss of profit, whether plaintiff is entitled to loss of profits about sub-block A only or the entire concession area under the concession agreement.

THE ANALYSIS AND DECISION OF THIS COURT

Whether the plaintiff is entitled to claim loss of profits as the result of the breach of the concession agreement by the defendant or must only be confined to actual loss incurred by plaintiff

[16] On this issue, it is pertinent to evaluate the nature of the agreement by parties and its breach. In the present case, the High Court had decided that

defendant had breached the concession agreement when defendant prematurely terminated the agreement before the expiry period of the said contract. The concession agreement dated 15 January 2002 for eight years was terminated on 15 August 2002, which was six months after signing the contract and 7 1/2 years before its expiration. No appeal was filed by defendant against the decision of the High Court.

[17] In the circumstances, we find that plaintiff was deprived of its right to perform his rights and obtained the benefits under the concession agreement is entitled to loss of profit arising from the said breach under s 74 of the Contracts Act 1950 ('the CA 1950'). There is a plethora of cases that support this view and it is useful to cite the Federal Court case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 where the court explained as follows:

> [126] Therefore, on a proper construction of the agreement, *we agree with the appellant's submission that breach of the agreement may give rise to damages for loss of profit pursuant to s 74 of the Contracts Act 1950.*
>
> [127] Section 74(1) and (2) of the Contracts Act 1950 is reproduced in this judgment:
>
> > 74 Compensation for loss or damage caused by breach of contract
> >
> > (1) *When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be the likely result from the breach of it.*
> >
> > (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> Thus, we find that an assessment of damages would be appropriate in this appeal. (Emphasis added.)

[18] Further, the Federal Court in the same case, emphasised the principle of law that the loss suffered must be within the contemplation of both parties that the loss was a natural and probable result of the defendant's breach. Zainun Ali FCJ in that case said this:

> [128] Section 74(1) and (2) in *Hamdan bin Johan & Ors v FELCRA Bhd & Ors* [2010] 8 MLJ 628; [2010] 3 CLJ 474 was held to substantially affirm the common law rule laid down in *Hadley v Baxendale* (1854) 9 Ex 341; (1854) 165 ER 145 wherein the general assessment of damages for breach of contract, *the general rule is that the aggrieved party is to be put in the same position as they would be if the contract had been properly performed, so that normally he is entitled to recover from the contract breaker his loss of profit or the benefit of the bargain. The other cases cited by the appellant include Bank Bumiputera Malaysia Bhd Kuala Terengganu v Mae Perkayuan*

Sdn Bhd & Ors [1993] 2 MLJ 76 and *Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim* [2014] 1 MLJcon 213; [2008] 9 CLJ 46 essentially set forth the same propositions ie that *the damage or loss suffered must be within the contemplation of both parties whether actual or constructive, that the loss suffered was a natural and probable result of the defendant's breach and that it included loss of profits. We have no disagreement with the statements of principle in this case.* It is clear that a rate of commission amounting to 20% was agreed for the collection of the arrears, and it, therefore, would be the natural and probable result, as well as have been in the contemplation of the parties that premature termination would result in the loss of those profits. (Emphasis added.)

[19] An earlier Federal Court decision in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, explained at length the same issue in the following manner:

The governing principles

The starting point regarding this part of the case is s 74 of the Contracts Act 1950 (Rev 1974), which is really declaratory of the common law rules enunciated in the celebrated case of *Hadley v Baxendale* (1854) 9 Ex 341 at p 354; 156 ER 145 at p 151. (See *Bank Bumiputra Malaysia Bhd v Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76 at pp 87–91).

At common law, the general principle which constitutes the starting point in the assessment of damages for breach of contract is, in the words of Parke R in *Robinson v Harman* [1843–60] All ER Rep 383 at p 385; (1848) 1 Ex 850 at p 855; 154 ER 363 at p 365, *'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'*. This was cited with approval by the Court of Appeal in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at pp 414 and 420; [1967] 3 All ER 686 at pp 710and 714; [1967] 3 WLR 1491 at pp 1527 and 1532; [1994] 3 MLJ 777 at 788.

But, the general principle aforesaid has been qualified and limited by *Hadley v Baxendale* where the principles enunciated are these:

> *Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally*, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Explaining the distinction between the first and the second rules in *Hadley v Baxendale*, Lord Wright said this in *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] AC 196 at p 221; [1949] 1 All ER 1 at pp 12–13:

> The distinction there drawn [viz in *Hadley v Baxendale*] is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties: in the latter event it is laid down that the special facts

must be communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages; ...

It goes without saying that if the effect of allowing a plaintiff's claim is to put him in a better position than he would have been if there had been no breach, then this would be contrary to the principles enunciated in the cases cited above. This means that any profit which he stands to make because of the breach, must be deducted from the damages awarded — a point aptly put by Mr Hugh Beale in his most useful book on Remedies for Breach of Contract:

The basis of assessment

In outline, the victim of a breach of contract is entitled to compensation for any loss which results from the breach and which is neither too 'remote', or unlikely, a consequence nor one which he could have avoided by taking reasonable steps in 'mitigation'. *He is 'to be placed in the same situation as if the contract had been performed'.* (*Robinson v Harman* (1848) 1 Ex 850 at p 855). This involves considering his overall position. The damages should compensate him for the performance which he should have received but has not, with deductions for any savings he has or should have made through not having to perform himself or by other action, such as entering a substitute transaction with someone else. Any profit which he is only able to make because of the breach of contract should also be deducted. These deductions are made in accordance with the general principle that an award of damages should not put the victim in a better position than if the contract had been performed; he should recover no more than he has lost. Punitive or exemplary damages might be awarded where a breach of contract was also a tort, but in English law they are not awarded for a mere breach of contract (*Perera v Vandiyar* [1953] 1 WLR 672). (Emphasis added.)

[20] Likewise in the Supreme Court case of *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569; [1994] 4 CLJ 783, Mohammed Dzaidin SCJ (as he then was) said this:

Therefore, the basic question for our decision here is whether the learned judge was correct in his assessment of damages for loss of profits. That raises the question whether he applied the correct principles of law or whether the amount was based on an entirely erroneous estimate of the damage (*Flint v Lovell* [1934] 1 KB 354 at p 360).

In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* [1854] 9 Exch 341 (*Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39; *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Ors.* [1993] 2 MLJ 76 (SC). In essence, the section states that the party may recover any loss or damage for any breach which *(a) naturally arose in the usual course of things* or *(b) which the parties knew, when they made the contract, to be likely to result from the breach of it*. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the

second limb of *Hadley v Baxendale*, which is, the party may recover damages which may *'reasonably be supposed to have been in contemplation of both the parties, of the time they made the contract'* ... (Emphasis added.)

[21] Further, this court in *Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2015] 2 MLJ 24 held as follows:

[57] *A claim for damages for breach of contract is governed by s 74 of the Contracts Act 1950.* It was held by Rohana Yusuf J (now JCA) in the case of *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2011] 1 CLJ 755 *that 'under* s 74 of the Contracts Act 1950, *the damages entitled to be claimed by the plaintiff must be foreseeable loss which naturally arose from the breach by the defendant or which the parties at the time making the contract know to be the likely result of the breach'*. It is trite that any claim for loss and damage must be foreseeable. *In this case it cannot be disputed that the claim by the appellant for the loss of profits was foreseeable and not too remote. It was wholly foreseeable that when the respondent decided to unilaterally terminate the contract, the appellant would be put to loss and expense* ... (Emphasis added.)

[22] On the same issue, in the case of *Sarawak Building Supplies Sdn Bhd v The Director of Forests & Ors* [2009] 9 MLJ 224 the court also allowed the plaintiff's claim for loss of profits against the defendant for prematurely revoked the plaintiff's license to extract timber.

[23] Based on the principle of law above mentioned and the facts in the present case, it is undoubtedly that the plaintiff suffered loss of profits when it was deprived of the performance of the concession agreement which was prematurely terminated by defendant after six months it was entered into with 7 1/2 years from the expiration period. The High Court was correct when decided that plaintiff was entitled to loss of profits.

[24] Therefore, in the present case, we find plaintiff is entitled to claim the loss of profits for defendant's breach of the concession agreement. The loss suffered by plaintiff was a natural and probable result of defendant's breach within the contemplation of both parties and certainly not too remote in the circumstances.

Whether plaintiff is entitled to loss of profits about sub-block A only or the entire concession area under the concession agreement

[25] Before we proceed to determine the issue at hand, it is trite law that plaintiff must prove its claim for damages and in the present case for the loss of profits suffered by the plaintiff. In this regard, in the Federal Court case of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 100, it was explained in the following words:

The respondent, as plaintiff, of course, had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 at p 178:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it. (Emphasis added.)

[26] Reverting to the present case, in proving the loss of profits arising from the breach of the concession agreement, plaintiff had adduced evidence through, inter alia, Mohd Aimi bin Omar (SPI), a registered valuer from AMI & Associates, Ong Chye Lye (SP4), Executive Director of Anika Megah Sdn Bhd and their respective reports which are the 'Assessment on Lost Profits of 16,599 Hectares Timber Concession Within Permanent Forest Reserve of Petuang and Tembat Mukim and District of Hulu Terengganu, Terengganu Darul Iman' dated 14 August 2014 (P3) and Forest Appraisal Report dated 20 April 2002 (P2).

[27] In P3, the assessment on loss of profit is regarding the entire area of the timber concession which is 16,599 hectares (41,000 acres). The assessment was premised on the investigation done on the concession, the Forester Appraisal Report (P2), and other related documents. SP4 was involved in the preparation of P2 and one of the signatories of the report other than Tay Soon Poh, the former Director of Anika Megah Sdn Bhd.

[28] The estimated merchantable timber volume (MTV) is based on a timber cruise carried out by the Kuala Berang District Office at the end of 2000 and in early 2001. Reference was also made to the estimated volume by JNPT which was approximately 1,820,065 cubic meters or 1.2 million tonnes. This is consistent with the total extractable volume stipulated in article 2.2 of the concession agreement which states:

> Bagi maksud-maksud perjanjian ini keluasan kawasan Perjanjian ialah +/- 16,599 hektar (+/- 41,000 ekar) keseluruhannya termasuk kawasan yang tidak berhasil yang mana ianya dianggarkan mengandungi kayu balak tidak kurang dari *jumlah keseluruhan 1.2 juta tan*. (Emphasis added.)

[29] Apart from the information obtained from JNPT, SP1 as stated in P3, also referred to the Forester Appraisal Report (P2) by Anika Megah Sdn Bhd. Based on P2 the total MTV was 3,601,485m3. SP1 then analysed the timber

prices trend from 2003 to 2012. In arriving at the market prices of timber logs for the concession, SP1 obtained data from the Malaysian Timber Industry Board, JPNT, and other related publications.

[30] SP1 further explained in detail the methodology and basis of the assessment made which is consistent with the general principle of assessment of damages laid down in the case of *Sarawak Building Supplies Sdn Bhd v The Director of Forests & Ors*. SP1 had used the discounted cash flow method or approach as provided under the Malaysian Valuation Standard 2011.

[31] SP1 also assessed the logging costs for the concession by taking into account studies made by several researchers and of the view that the logging costs for the concession is at RM120 per cubic meter.

[32] In conclusion, the total estimated revenue for the concession is RM1,156,905,010 and the total estimate expenditure is RM470,787,799 which give the net profit of RM686,117,212. However, SP1 agree that adjustment has to be made for royalty payments and silvicultural cess in the sum of RM28m. Therefore, the net profit is RM686,117,212 – RM28m = *RM658,117,212.* In P3, SP1 concluded that the lost of profits for the concession is RM1,226,000,000 and after deducting RM28m the lost of profits is *RM1.198m.*

[33] Earlier, about the concession agreement, SP1 had prepared a valuation report in 2002 (P7). The issue was raised that there are differences in the content of P7 and P3. However, the reasons for the differences have been explained by SP1 and accepted by the deputy registrar.

[34] The defendant, on the other hand, had not produced any valuation report about the concession or adduced evidence which strongly challenged the calculation on the loss of profit by plaintiff's witnesses. Therefore, the deputy registrar was correct in relying on the plaintiff's valuation report after finding the report was supported by reliable data and other evidence.

[35] It is pertinent to note that the deputy registrar had made a finding that both SP1 and SP4 are credible witnesses and accepted their evidence. In his judgment he said this:

> Saya telah menghalusi semua keterangan saksi-saksi dan dalam kes ini, *saya berpuas hati dan menerima keterangan saksi-saksi plaintif yang berkredibiliti dan boleh dipercayai*. Encik Ami (SP1) dan juga En Ong Chye Lye (SP4) secara khususnya memberi keterangan secara terperinci berkenaan isi kandungan VR 2002 dan 2014 masing-masing. VR yang diberikan ini sememangnya satu estimates, namun *ia berpandukan kepada data-data yang menyakinkan dan convincing*. Harus diakui sememangnya ada sedikit sebanyak kelemahan atau kekurangan di dalam

keterangan mereka, tetapi ianya bukan material error dan tidak serious discrepancy yang mencacatkan isi kandungan VR mereka.

Dua saksi penting ini telah secara konsisten memberi keterangan masing-masing walaupun diasak secara bertubi-tubi oleh peguamcara defendan semasa pemeriksaan balas yang panjang dan amat detail sekali. En Ami sendiri secara jujur mengakui berkenaan kadar yang tidak tepat untuk pembayaran royalty dan silvicultural cess dan telah revise amount loss of profit dari RM1.226m kepada RM1.198m dan penjelasannya berkenaan amount tersebut adalah logik dan munasabah.

Saya berpuas hati bahawa method discounted cashflow berkaitan merchantable timber volume bagi industry pembalakan ini adalah satu method yang boleh diterimapakai sebagai salah satu kaedah membuat taksiran bagi industry berkaitan pembalakan. Maka dengan penerimaan kedua-dua VR ini oleh mahkamah, *pihak defendan boleh sahaja mengemukakan saksi-saksi defendant yang boleh menyangkal dan menyanggah keterangan khususnya melibatkan laporan penilaian plaintif. Tetapi keterangan saksi plaintif cuma memfokuskan kepada kaedah dan manual pengurusan dalaman Jabatan Perhutanan tiada dan sebarang cabaran yang kukuh dilontarkan untuk menyanggah isi VR 2002 dan 2014.* (Emphasis added.)

[36] The finding of facts by the deputy registrar, inter alia, based on the credibility of SP1 and SP4 was upheld by the High Court where this was said in the grounds of judgment:

[37] *There was not an iota of evidence adduced on the part of Defendant to rebut or challenge the quantum of damages claimed by plaintiff*. Furthermore, it is my considered view that the evidence adduced by plaintiff to support its claim for loss of profit is not so incredible or romancing in nature as to warrant the court to reject its evidence.

...

[40] Having perused the grounds of decision of the learned Deputy registrar and the record of appeal, this court finds that *the learned Deputy Registrar did not err in the findings after hearing the oral testimonies of all witnesses and having the opportunity to observe the demeanor of witnesses.* Applying the law and principles enunciated in the above-mentioned case, this court finds that there is no basis to interfere with the findings of the learned Deputy Registrar especially those *based on the credibility of SP1 and SP4.* (Emphasis added.)

[37] In this regard, having considered the available evidence before the court as alluded to earlier and the applicable law, we have no reason to disagree with the concurrent findings of the deputy registrar and the High Court judge.

[38] The next main issue for determination of this court is whether the loss of profits must relate to the entire area of the timber concession which is 16,599 hectares (41,000 acres) or limited only to sub-block A which covers the area of 166.44 hectares (411.27 acres) where the license to extract timber product was issued.

[39] The deputy registrar decided that the loss of profits is limited to work done in sub-block A only that is the concession area of 166.44 hectares (411.27 acres). In his ground of judgment, he said this:

> Namun begitu, saya tidak terikat untuk memberi jumlah amaun yang dinyatakan oleh SP1 untuk loss of profit kerana *saya harus mengambilkira setakat mana kerugian yang dialami yang boleh dianggarkan berdasarkan kerja-kerja yang telah dibuat*. Walaupun plaintiff telah membayar untuk tiga lessen, tetapi yang pasti Plaintif telah benar-benar hanya dapat membuat kerja di atas sub blok A sahaja yang melibatkan 166.44 hektar dan tidak dapat mencapai jumlah kesuluruhan amaun untuk satu lessen (499 hektar atau 1,233.03 ekar). *Saya berpandangan gantirugi yang munasabah dan sesuai untuk plaintiff ialah hanya untuk sub blok A sahaja, iaitu total untuk 166.44 hektar (411.27 ekar) sahaja dan bukan keseluruhan tiga lessen untuk 41 ribu ekar.* (Emphasis added.)

[40] The High Court judge had affirmed the decision of the deputy registrar which allowed plaintiff's claim for loss of profits for sub-block A only. The judge had this to say:

> [41] The learned deputy registrar had however constrained himself from allowing the full extent of damages claimed by the plaintiff on the ground that the JNPT had only issued one license for plaintiff to carry out logging activities in one sub-block only with the area of 1,233.03 acres from the total of 41,000 acres of land.
>
> [42] Due to the uncertainties as to the eventual approval of license for the logging activities for the other two sub-blocks, which may be subject to revision, which will reduce the overall numbers of merchantable timber available for the plaintiff, *it is in my considered view that the Learned deputy registrar was correct in limiting the damages claimed by the plaintiff*. (Emphasis added.)

[41] Before we proceed further, we need to emphasise here that the appellate court will not interfere with the award of damages unless the award was made on a wrong principle of law, the facts have been misapprehended or the estimate of damage suffered was erroneously made. This was explained by the Federal Court in the case *Mohamed Ibrahim & Anor v Christopher Piff & Anor* [1981] 1 MLJ 221; [1980] 1 LNS 139 as follows:

> It would not be amiss to repeat what Lord Wright said in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at p 616:
>
> > Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, *the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages.* It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell* [1935] 1 KB 354. In effect the court, *before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other*

reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency. (Emphasis added.)

[42] In determining the issue at hand, reference to the concession agreement dated 15 January 2002 entered into by both parties is paramount important.

[43] In the concession agreement, defendant agreed to award plaintiff a concession to extract timber and other forest products from an area measuring approximately 16,599 hectares (41,000) and the agreement was for a period of eight years with the conditions stipulated therein. This is provided for under articles 2.1, 2.2, and 2.6 of the agreement which are as follows:

(i) *2.1 — Kerajaan Negeri* akan *membenarkan Pelesen* mengerjakan Kawasan Perjanjian bagaimana ditunjukkan di dalam pelan kembaran dan bertanda di Lampiran 'A' bagi kerja menebang dan membalak kayu-kayu di dalamnya dan memindahkan kayu-kayu berkenaan dari Kawasan itu.

(ii) *2.2* — Bagi maksud-maksud perjanjian ini keluasan Kawasan perjanjian ialah +/- 16,599 hektar (+/- 41,000 ekar) keseluruhannya termasuk Kawasan yang tidak berhasil yang mana ianya dianggarkan mengandungi kayu balak tidak kurang dari jumlah keseluruhan 1.2 juta tan.

(iii) *2.6* — Dengan tertakluk kepada syarat-syarat yang ditetapkan dalam ini, maka *perjanjian ini hendaklah berkuatkuasa selama tempoh 8 tahun daripada tarikh Lesen diperolehi oleh Pelesen dari Pihak Berkuasa Kerajaan Negeri.*

[44] However, the plaintiff's right to extract the timber and forest products under the concession agreement is subject to the issuance of a license by JPNT as provided in the preamble of the agreement as follows:

DAN BAHAWASANYA Pelesen berjanji untuk menebang, mengambil dan mengeluarkan kesemua jenis kayu dan tumbuhan yang berkenaan daripada Kawasan Perjanjian (kemudian ini disebut 'Kerja Membalak') *dengan syarat Jabatan Perhutanan Negeri Terengganu mengeluarkan lesen berkaitan bagaimana terdapat dalam Peruntukan Akta Perhutanan Negara 1984 dan Kaedah-Kaedah Hutan 1986 (kemudian daripada ini di sebut 'Lesen')*. (Emphasis added.)

[45] The word 'Pelesen' used for plaintiff in mostly all the provisions under the preamble and articles in the concession agreement supported the fact that having a license was a pre-requisite of any work to be done by plaintiff and this is consistent with the agreed term as stipulated in the preamble alluded to earlier.

[46] Having analysed the articles and preamble stated above, it is our view that both parties had agreed that the plaintiff's rights to extract timber and forest products from the concession area arise upon the issuance of the license by JPNT. Without such a license, plaintiff would not be able to perform its duties and obligations under the agreement and consequently could not receive the profits anticipated from the performance of the said duties and obligations.

[47] In the present case, it is an undisputed fact that only one license had been issued by JPNT for plaintiff to extract timber and forest products in sub-block A with an area of 166.44 hectares (411.27 acres). As such, the deputy registrar was correct to allow plaintiff's claim for loss of profits concerning sub-block A. we find there is no misapprehension of facts, or application of wrong principle of law in the present case. The calculation or method of assessing the loss of profits by the deputy registrar was also reasonable in the context of the concession agreement. As such, there is no reason for us to intervene against the said decision.

[48] Although plaintiff contended that payment had been collected for three licenses by defendant, this does not change the fact that only one license was issued for extraction of timber and timber products in sub-block A.

[49] Further, the fact that plaintiff had abandoned its claim for actual damages as raised by defendant, it does not preclude plaintiff to claim loss of profits and this claim was pleaded in the statement of claim.

CONCLUSION

[50] In the circumstances, it is our unanimous decision that both appeals by plaintiff and defendant are dismissed and the decision of the High Court in affirming the decision of the deputy registrar on the assessment of damages is affirmed. Both parties are to bear their own costs.

Both appeals dismissed; and decision of the High Court affirmed.

Reported by Ashok Kumar